Supreme Court, U.S.
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No. 93-1020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

Organizacion JD Ltda., and Manufacturas JD Ltda.,

Petitioners,

v.

United States of America, The Drug Enforcement Administration, Banco Atlantico, and The Bank of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

Although Organizacion J.D. Ltda., and Manufacturas J.D. Ltda. (hereinafter "the Limited Partnerships"), prevailed against the United States (hereinafter "the Government"), in United States v. Johnny Daccarett, 801 F.Supp. 984, 6

F.3rd 37 (2d Cir. 1993) (hereinafter "All Funds Case"), the lower courts denied their claim for damages under federal communications and banking laws. Thereafter, the Government used an unauthorized handwritten Notice of Levy, served prior to the Internal Revenue Service had issued any notice and demand, assessment, or findings, so to seize again the Limited Partnerships' funds found to be not forfeitable, and to not be the property of Mr. Johnny Daccarret.

Subsequently, the District Court denied the Limited Partnerships' claim for damages against Banco Atlantico, The Bank of New York (hereinafter "the Intermediary Banks"); and the Government. This case was appealed, and oral argument was presented on May 3, 1993. To

date, no decision has been issued in Organizacion J.D. Manufacturas J.D. Ltda. v. U.S. Dept of Justice, the Drug Enforcement Administration, Banco Atlantico, S.A. and the Bank of New York, appeal docketed, No. 93-6019 (2nd Cir. 1993) (hereinafter the "Intermediary Bank Case").

I. THIS PETITION IS OF IMPERATIVE PUBLIC IMPORTANCE BECAUSE THE SECOND CIRCUIT HAS DEFIED THE CLEAR INTENT OF CONGRESS, WHICH REQUIRES THAT A WARRANT BE ISSUED IN ACCORDANCE WITH THE FEDERAL RULES OF CRIMINAL PROCEDURE, BEFORE PERMITTING THE GOVERNMENT ACCESS TO ELECTRONIC COMMUNICATION IN TRANSIT AND IN COMPUTER STORAGE.

In Chevron U.S.A., Inc., v. National Resources Defense Counsel, 104 S.Ct. 2778 (1984), the Court stated that in deciding a federal question, the first issue a court must determine is whether Congress has directly spoken to the precise question at issue, and if it

is determined that, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." id. at 2781.

Despite this bench mark to be used in statutory analysis, the Second Circuit refused to find as a matter of law:

(I) that 18 U.S.C. § 2516(3), permits the Government's law enforcement officials to obtain the information in electronic communication in transit only if a court order has been issued under the Federal Rules of Criminal Procedure; and,

(II) that 18 U.S.C. § 2703(a) and (b), permit the Government access to stored electronic communication for:

(i) 180 or less only if the Government has obtained a search warrant issued under the Federal Rules of Criminal Procedure; and, (ii) for stored electronic communication messages for more than 180 days, only if the Government has acquired either: (1) a search warrant issued under the Federal Rules of Criminal Procedures, (2) or a federal administrative subpoena issued with notice to the designated recipient of the communication.[1]

In fact despite the Second Circuit's holding in the All Funds Case, it has been reported,[2] that the Government

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[1]See §19.5, at p. 372 through 399, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991)

[2]Newsweek, "Bottom Line" page 31, February 14, 1994, The FBI Monitors the Info Highway, "Should national security take precedence over freedom of information on the electronic frontier? The Clinton administration in effect, has said yes; it adopted a controversial computer-

has begun to promulgate regulations that permit the interception of in transit electronic communication only after the Government has obtained the required court order issued under the Federal Rules of Criminal Procedure.[3]

Thus it is indisputable that Congress did specifically amend Title III of the Omnibus Crime Control and Safe

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encryption standard embodied in a device known as the Clipper Chip that lets law enforcement agencies unscramble messages after obtaining a court order to obtain a decoding "key." This will be mandatory on all federally owned communications devices and computers, and the government hopes it will become the de facto industry standard. The decision was bitterly opposed by civil-liberties groups and U.S. industry, which says that U.S. business will now simply turn to foreign-made encryption devices and that foreigners will be reluctant to buy American machines that can be tapped by U.S. intelligence agencies.

[3]Other recent news articles too numerous to cite in this Reply, as well as the Government's current regulatory efforts, and the Government's policy statements as enunciated by the Clinton Administration regarding "privacy" on the "Information Super Highway," underscores the imperative public importance of the issue now before the Supreme Court.

Streets Act of 1968, 18 U.S.C. §§ 2510 et seq., by enacting the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq. and §§ 2701 et seq., (hereinafter "ECPA"), to limit the Government access to electronic communications in transit and in computer storage as Petitioners have argued in both the District Court and the Court of Appeals.

In summary, Petitioners have established that unauthorized interception did occur, through both the Government and the Intermediary Banks own admission,[4] that no warrant was issued in

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[4]The Intermediary Banks admit they failed to comply with the instructions contained in every third party transfer going to the Republic of Colombia, including the three belonging to the Limited Partnerships, based only on the instructions from the United States Attorney for the Eastern District of New York, (Banks Br. at 3, 4); and the Government admits that, "[h]ere the government did not intercept the EFT transmission while they occurred, but instead simply directed

accordance with the Federal Rules of Criminal Procedure, to permit the procuring of the placing of "stop ques" in the Intermediary Banks computer modems so to "freeze" the electronic communication. Thus the Second Circuits holding must be reversed in the All Funds Case, as well as its refusal to move on the Intermediary Bank Case, and both actions be remanded to the District Court.

II. THE INTERMEDIARY BANKS WERE ACTING AS AGENTS OF THE GOVERNMENT, NOT THE COURT, WHEN THEY PLACED "STOP QUES" IN THEIR COMPUTER MODEMS, AND PERMITTED SEARCHES OF ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT AND IN COMPUTER STORAGE GOING TO THE REPUBLIC OF COLOMBIA, BASED ONLY ON A GENERAL IN REM ADMIRALTY WARRANT AND VERBAL ORDERS OF MESSRS. HUI AND BROWN.

In both the All Funds Case, and the Intermediary Bank Case, the Court of

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the intermediary banks not to credit the EFTs to the Colombian corresponding banks." (Gov't Br. at 12).

Appeals affirmed the District Court denial of all discovery on all issue relating to the alleged interception and disclosure of information in computer storage (Lod. 15 and Lod. 18)[5], and dismissed the complaints based on its use of the "relation back doctrine," prior to final judgment. However, this use of the "relation back doctrine," was rejected in United States v. 92 Buena Vista Avenue, 113 S.Ct 1126 (1993)

But since there was no discovery Petitioners must rely on the admissions of the Government and the Intermediary Banks that without any warrant issued or sought under the Federal Rules of Criminal Procedure, Messrs. Hui and Brown did

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[5]"App. " references are to the section and page number in the Appendix. "Lod. " references are to the page number in the Lodging filed and submitted with this Petition.

verbally instruct over the telephone the Intermediary Banks to:

(i) to place stop ques in their modems and "freeze" and comply with all accepted electronic communications instructions going to the Republic of Colombia between July 13, through September 1, 1990; and,

(ii) permit repeated warrantless searches of all electronic communications that had gone to the Republic of Colombia since January, 1990.

Yet despite these admitted facts, which establish that the requirement of 18 U.S.C. §§ 2516(3) and 2703(a) and (b), were violated by both the Government and the Intermediary Banks, the Intermediary Banks boldly argue that they deserve the protection of the courts because they in "good faith" com-

plied with the verbal order issued under 21 U.S.C. §881(b)(4), and were acting as officers of the Court.

Both arguments are untenable, since neither the in re warrant nor the verbal order of Messrs. Hui and Brown, meet the Congressional requirements; there was no prior judicial involvement, only the in rem warrants, and the question of whether or not the Intermediary Banks acted in "good faith" is a factual question which cannot be determined by the Intermediary Banks self serving protestations alone, Doyle v. Gordon, 158 N.Y.S.2d 248. Thus since the District Court denied all discovery when it granted summary judgement, the Intermediary Banks unsupported assertion of "good faith," must be rejected.

III. BECAUSE THE INTERMEDIARY BANKS PLACE THE ELECTRONIC FUND TRANSFER COMMUNICATIONS IN AN "STOP QUE ACCOUNT," AND WERE COMPENSATED FOR THEIR COST UNDER THE PROVISIONS OF THE RIGHT TO FINANCIAL PRIVACY ACT, THE LIMITED PARTNERSHIPS HAVE A RIGHT TO DAMAGES FOR UNAUTHORIZED DISCLOSURE.

The Intermediary Banks admit that the three in transit electronic fund transfers communications were placed in computer storage in a "stop que account" under their name at the Intermediary Bank, and then were disclosed to await further instructions from Messrs. Hui and Brown (Lod-5 and Lod. 12).

Furthermore, the Intermediary Banks admit they were compensated for their expenses under the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. (Lod. 14).

For the above reasons, the Limited Partnerships argue that they became cus-

tomers of the Intermediary Bank as a result of the "stop que account" which made them constructive[6] account holders, for which the Intermediary Bank owed a duty under the Right to Financial Privacy Act.

IV. **SINCE TWO ENTERED FINAL DECISIONS FOUND THAT MR. JOHNNY DACCARETT HAD NO INTEREST IN THE FUNDS OF THE LIMITED PARTNERSHIP THE APPEALS COURT ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT HAVE TO COMPLY WITH RULE 60(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE PRIOR TO ORDERING THE CLERK TO FOLLOW THE HANDDRAFTED NOTICE OF LEVY, ON ITS FACE INVALID SINCE IT WAS ISSUED AND SERVED BY MESSRS. HUI AND BROWN.**

In the All Funds Case, on February 21, 1991, Mr. Johnny Daccarett claim was

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[6] Black's Law Dictionary, Sixth Ed. at p. 313, defines "Constructive" as that "[w]hich is established by the mind of the law in its act of construing facts, conduct, circumstances instruments. That which has not the character assigned to it in its own nature, but acquires such character in consequence of the way in which it is regarded by rule or policy of law. . . .

dismissed based on the failure of the Government to establish that he had any personal interest in the three electric funds transfers which were going to the Limited Partnerships.

This decision was reconfirmed on August 5, 1992, in the District Court's final order, wherein it stated that:

> "... in this case no credible evidence has been submitted demonstrating that [Mr. Daccarett] controls any claimant or that he will receive the benefit of proceeds returned to a claimant. Nor is there any evidence to suggest that Daccarett is flouting the judicial system in this forfeiture case.... It is the claimant corporations, Manufacturas JD and Organizacion JD, which prevailed at trial--not Johnny Daccarett. The government has shown no persuasive reason to bar the corporate claimant from receiving their funds...." All Funds Case at App. 63a-65a.

Subsequently, on September 9, 1992, thirty-five days after the entering of his final order of August 5, 1992, the District Court instructed the Clerk to

comply with the handwritten Notice of Levy dated July 29, 1994 (Lod. 22), that had been issued and served by Messrs. Hui and Brown, and which again alleged that the Limited Partnerships were the nominee of alter ego of Mr. Johnny Daccarett.

The District Court's decision was issued without requiring the Government to present any evidence to refute the Limited Partnerships' objections based on: (1) the Government's failure to have mailed the notice and demand, Prompt Billing Assembly Form 3552, parts 3 and 4; (2) the Government's failure to present the required written findings under 26 U.S.C. § 6331(d)(3); the Government's failure to present the written statement required issued by August 29, 1992, in accordance with 26 U.S.C. § 7429(a);

and, (4) the Government failed to refute that the handwritten Notice of Levy was drafted and served by Messrs. Hui and Brown, and not by the Internal Revenue Service.

The Second Circuit upheld the District Court's blind compliance with the handwritten Notice of Levy, despite this Court's holding in Commissioner v. Shapiro, 424 U.S. 614 (1976), at 617-618, that whether jeopardy assessment finding is made or not, and whether or not a Notice of Jeopardy Assessment or Notice of Jeopardy Levy is issued, a taxpayer must be given the 10 day statutory notice and demand, as well as be given an opportunity to fail or refuse to pay tax, as required under 26 U.S.C. § 6861(a) and (h)(2), and 26 U.S.C. §

6331(a). See also: Martinez v. U.S., 669 F.2d 568 (9th Cir. 1981).

Justice Harlan stated accurately in his dissent in Fire Ass'n of Philadelphia v. People of the State of New York, 119 U.S. 110, 7 S.Ct. 108 at 114 (1886), that, "[t]he denial of the equal protection of the laws may occur in various ways. It will most often occur in the enforcement of laws imposing taxes."

In this action, the Limited Partnership presented a prima facia case that because the United States Department of Justice had not been able to prevail in the All Funds Case, Messrs. Hui and Brown via the issuance of the handwritten Notice of Levy, did conspire to deprive the Limited Partnerships of their property through use of the tax

code. However without any consideration for the Limited Partnerships' rights to due process or equal protection of the laws, both the trial court and the Second Circuit looked the other way because the litigants are only nonresident alien Colombians, and the United States was alleging, but unable to prove, money laundering.

The fact that the Limited Partnerships have a right to file a wrongful levy action,[7] does not negate the fact that they have been denied due process and equal protection of the law by the

[7]Both the Limited Partnerships and the undersign counsel filed timely administrative action, and a wrongful levy abuse of process action, Isidoro Rodriquez, Esq., Organizacion J.D. Ltda., and Manufacturas J.D. Ltda., v. United states, Civil Nos. CV-93-4141 and 93-0745 (Weinstein, J.). However, nineteen months after their funds were seized, discovery has only just been ordered, but Judge Weinstein has again denied discovery of Messrs. Hoi and Brown, although they issued and served the handwritten Notice of Levy.

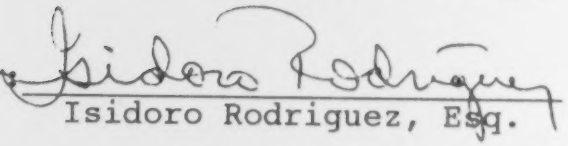
failure to comply with Rule 60(B) F.R.C-.P., prior to amending the two entered final orders.

CONCLUSION

Based on the above, the Petition for writ of certiorari should be granted.

Respectfully submitted,

ORGANIZACION JD LTDA., AND
MANUFACTURAS JD LTDA.

By: 
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